SUPREME COURT, U. S.

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NO. 268

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

RAYMOND BURNS,
Petitioner,

VS.

THE STATE OF NEW MEXICO,
BUREAU OF REVENUE,
INCOME TAX DIVISION
VICENTE OJINAGA, ACTING DIRECTOR,
Respondents.

AND

JAMES B. HERT,
Petitioner,

VS.

THE STATE OF NEW MEXICO,
BUREAU OF REVENUE,
INCOME TAX DIVISION
HOWARD DOWNEY, ACTING DIRECTOR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

Petitioners, RAYMOND BURNS and JAMES B. HERT, pray that a Writ of Certiorari issue to review the Judgment of the Supreme Court of New Mexico entered on April 8, 1968, in the consolidated cases of RAYMOND BURNS v. STATE OF NEW MEXICO, ET AL. (No. 8453) and JAMES B. HERT v. STATE OF

NEW MEXICO, ET AL. (No. 8454), which Judgment affirmed those of the District Court of Santa Fe County, New Mexico, entered therein, denying Petitioners any relief in their actions against the State of New Mexico Incoe Tax Law, and awarding the State judgment on its counterclaim against HERT for back taxes.

OPINIONS BELOW

The Supreme Court of New Mexico has issued an opinion in this case, a copy of which appears in Appendix "A" to this petition, at pages 1a-9a. The opinion has not yet been reported.

JURISDICTION

The judgment of the Supreme Court of New Mexico was entered on April 8, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

1. Whether the State of New Mexico, under the Buck Act, has the Constitutional power and legislative jurisdiction to levy an income tax on non-resident employees at White Sands Missile Range, New Mexico, an area over which the State ceded exclusive jurisdiction to the United States when no valid income tax law as to non-residents existed, or does such levy violate the exclusive legislative power of Congress under Sections 1 and 8 (Clause 17) of Article I, and Section 1 of the 14th Amendment to the United States Constitution?

2. Whether the State of New Mexico can constitutionally levy an income tax on non-resident employees of White Sands Missile Range, New Mexico, who receive no benefits or protection from the State, or does such levy violate the Privileges and Immunities Clause in Section 2 of Article IV, Section 1 of the 14th Amend-

ment to the United States Constitution and the Due Process and Equal Protection Clauses therein.

3. Whether the State of New Mexico can constitutionally require non-resident employees at White Sands Missile Range, New Mexico, to pay the same rate of state income tax as residents without regard to the minimal (or non-existent) benefits and protection they receive from the State, or does such rate bear an unfair ratio to such benefits, if any, so as to violate the Privileges and Immunities Clause in Section 2 of Article IV, Section 1 of the 14th Amendment to the United States Constitution and the Due Process and Equal Protection Clauses therein?

4. Whether the State of New Mexico can constitutionally levy the full rate of state income tax on non-resident employees at White Sands Missile Range, New Mexico, on their income earned there because of their use of a road in the State to gain access to and from such exclusive federal area, or does such tax abridge their privileges and immunities conferred by Section 2 of Article IV and the Due Process and Equal Protection Clauses of the 14th Amendment to the United States Constitution to use such road without being so taxed?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. UNITED STATES CONSTITUTION

ARTICLE 1, SECTION 1 of the United States Constitution provides:

> "All legislative powers herein granted shall be vested in a Congress, which shall consist of a Senate and House of Representatives."

ARTICLE I, SECTION 8, CLAUSE 17 of the United States Constitution gives Congress the power,

> "To exercise exclusive Legislation in all Cases whatsoever, over such district (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock Yards, and other needful Buildings."

ARTICLE IV, SECTION 2 of the United States Constitution provides:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States"

ARTICLE IV, SECTION 3, CLAUSE 2 of the United States Constitution states:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ."

Section 1 of the 14th Amendment to the Constitution of the United States reads as follows:

> "All persons born and naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

B. NEW MEXICO LEGISLATION

Various New Mexico Statutes which are involved include the following:

1. "That *exclusive* jurisdiction be, and the same is hereby ceded to the United States over all the territories set apart from the public domain and comprised within the limits of the Fort Wingate Military Reservation, in McKinley County, and Fort Bliss Target Range, in Dona Ana County, and over such land as may hereafter be reserved from the public domain for the enlargement of said reservations; *provided, however,* that the State of New Mexico reserves the right to serve civil or criminal process within said reservations in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said state, but outside of such cession and reservations; and provided further, that the jurisdiction herein ceded shall continue no longer than the United States shall own and hold said reservation for military purposes." (N.M.S.A., 1953 Comp., Sec. 7-2-7) (effective February 12, 1941) (emphasis added)

2. 72-15-1. "*Purpose, Assessment and levy of tax*— There is assessed and levied a tax for the use of the State public school equalization fund, and the State government, at the rates specified in Sections 72-15-1 through 72-15-48 New Mexico Statutes Annotated, 1953 Compilation, upon the net income

   A. Of every resident individual . . .

   B. Of every foreign corporation or association and of every non-resident individual . . . having a business, agency or employment, or engaged in the transaction of business in, into or from this State, or deriving any income from any property or employment within this State, in proportion to the net income of such business, agency or employment as hereinafter provided." (1961, Ch. 150, § 1)

3. 72-15-1.1 "*Income taxes apply to persons on federal areas* — No person shall be relieved from liability for any income tax levied by this State, or by any duly authorized taxing authority herein, having jurisdiction to levy such a tax, by reason of his residing within a federal area or receiving income from transactions occurring or work or services performed in such area, with such taxes applying in federal areas to the extent permitted by Acts of Congress."
(1957, Ch. 225, § 1)

4. Sub-section E of N.M.S.A. 72-15-21 provides:
"The tax assessed by the provisions of Sections 72-15-1 through 72-15-48 New Mexico Statutes Annotated, 1953 Compilation is imposed at the same rates upon the net income of non-resident individuals of this State insofar as and to the extent that the net income was derived from property owned or business, trade, profession or occupation carried on in this State by those individuals."
(Laws 1961, Ch. 242, § 1)

5. 72-15-6 "Definitions of 'base income' and 'net income'—

A. 'Base income' of a tax payer means that part of the taxpayer's income generally defined as Federal taxable income and upon which the federal income tax is calculated less the federal income tax payable for the taxable year.
B. The 'net income' of all tax payers shall be the 'base income' adjusted to provide that: . . . (3) Amounts included in base income that the State is prohibited from taxing because of the provisions of the Federal Constitution, the State Constitution or federal laws shall be deducted; . . ." (Laws 1961, Ch. 242, § 1)

C. FEDERAL LEGISLATION

The Buck Act, 4 U.S.C. Sections 105-110, is also in-

volved in this case, and Section 106 thereof relating to income taxes provides:

> "(a) No person shall be relieved from liability for any income tax levied by any state, or by any duly constituted tax authority therein, *having jurisdiction to levy such a tax,* by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such state or taxing authority shall have the full jurisdiction and power to levy and collect such tax in any federal area within such state to the same extent and with the same effect as though such area was not a federal area." (Emphasis added)
>
> "(b) The provisions of subsection (2) shall be applicable only with respect to income or receipts received after December 31, 1940."

STATEMENT OF THE CASE

In 1940, Congress passed the Buck Act (54 Stat. 1059-61), 4 U.S.C. § 105-110, which concerns the liability of employees of federal areas for state income tax.

White Sands Missile Range, an area in southernmost New Mexico, was originally an extension of Fort Bliss, Texas, the large military establishment adjacent to El Paso, Texas, and was ceded by the State of New Mexico, within the meaning of Article I, Section 8, Cl. 17 of the United States Constitution, to the federal government in February of 1941 (N.M.S.A., 1953 Comp., Sec. 7-2-7.). A State Income Tax law was passed by the New Mexico Legislature in 1941, "upon every resident and non-resident", (N.M.S.A. 1941, Section 76-1220). Texas does not and never has had a State Income Tax. Texas residents subjected to the New Mexico income tax laws by virtue of their employment in the enclave had contested their liability before the instant actions were

brought. In the early 1960's, a suit was filed by a Texas resident on constitutional grounds and the New Mexico Supreme Court in *State v. Ashby*, 387 P.2d 588 (N.M. 1963), declared the tax invalid because it allowed exemptions for residents but not for non-residents and was held to be discriminatory and violative of the Equal Protection Clause of the 14th Amendment to the United States Constitution. Prior to the actual decision in Ashby, the New Mexico Legislature had repealed the sections which were to held invalid, and enacted tax laws with exemptions allowed to residents and non-residents alike. (N.M.S.A., 72-15-1, 72-15-21E, and 72-15-6). (1961) It is this later enactment which is the subject of attack by Petitioners in the instant cases.

Petitioners are both residents of El Paso County, Texas, and employees of the United States Government at White Sands Missile Range, New Mexico. In 1965, they brought separate actions in the District Court of Santa Fe County, New Mexico, seeking to recover from New Mexico amounts withheld from their earnings at White Sands Missile Range subsequent to May 31, 1964, for income tax imposed by the State on the grounds that New Mexico had no Constitutional authority or legislative jurisdiction to levy or collect such tax in that such tax violated Section 1 of the 14th Amendment and Section 2 of Article IV of the United States Constitution (Burns, 4, 5, 8, 9; Hert, 11, 12). (The pleadings and judgments in both cases in the District Court are found in Appendices "B" and "C"; infra). The State opposed plaintiffs' claims in both actions and counter-claimed in the Hert action for income tax claimed to be owed for the years 1961 through 1964, plus penalty and interest (Hert, p.15). Both causes were submitted to the District Court on stipulated facts, which included the facts of employment of the plaintiffs by the federal govern-

ment at White Sands Missile Range in New Mexico; their residence in El Paso, Texas; the amounts withheld or which would be due to the State of New Mexico if the income tax law were valid; and that White Sands Missile Range is a federal area in Dona Ana and Otero Counties, New Mexico (Burns, 12-14; Hert, 22-24).

The District Court in both actions entered judgment dismissing the complaints on the merits (Burns, 29, Hert, 45), and awarded the State of New Mexico the sum of $344.56 plus penalty of $34.46 and interest on its counter-claim against Hert, representing the full rate of claimed New Mexico income tax liability for the years 1961 through 1964 (Hert, 46, 46). The Court entered findings of fact and conclusions of law, including those to the effect that the Buck Act (4 U.S.C. §§ 105-110) conferred jurisdiction upon New Mexico to levy an income tax on the income of non-resident persons employed at White Sands Missile Range, and that the cession of exclusive jurisdiction over White Sands by New Mexico to the federal government was subject to the provisions of such Act (Hert, 39-42) (Burns, 24-26), and that the State was entitled to judgment, to all of which the plaintiffs excepted and appealed to the Supreme Court of New Mexico (Burns, 28-30; Hert, 44, 47), where the cases were consolidated. The Court, relying mainly on the Buck Act, held that New Mexico had the Constitutional power and legislative jurisdiction to tax non-resident employees at White Sands and affirmed the judgments entered below. The Court's opinion is found herein as Appendix "A".

REASONS FOR GRANTING THE WRIT

1. This case concerns the Constitutional power and legislative jurisdiction of the State of New Mexico to levy the full rate of income tax on non-resident employ-

ees at White Sands Missile Range, New Mexico, an area ceded by the State to the Federal Government when no valid income tax law as to non-residents existed, and the application of the Constitutional provisions conferring exclusive legislative jurisdiction to the Congress.

The New Mexico Legislature ceded exclusive jurisdiction to the United States over the property here involved, reserving only the right to serve civil and criminal process (Ch. 8, 1941 Sess. Laws, N.M.S.A., 1953 Comp., Section 7-2-7, see page 5, supra). This Court, in *Paul v. United States*, 371 U.S. 245 (1963), reaffirmed the ancient principle that,

> "Since a state may not legislate with respect to a federal enclave unless it reserved the right to do so when it gave its consent to the purchase by the United States, only state law existing at the time of the acquisition remains enforceable, not subsequent laws", 371 U.S. 268.

Since the legislature did not pass an income tax until later in 1941 and since the Supreme Court of New Mexico had held that the State's income tax as to non-residents was invalid for failing to allow exemptions allowed to residents, *State v. Ashby*, 387 P.2d 588 (N.M. 1963), no income tax law or any valid one as to non-residents was in existence at the time of the cession in 1941. Subsequent enactments by the New Mexico Legislature, including Sections 72-15-1, 1.1 and 21E, under which Petitioners' liability has been sustained here, are not enforceable on the federal enclave because adopted long after the transfer of sovereignty, *Paul v. United States*, 371 U.S. 245 (1963); *James Stewart & Co. v. Sadrakula*, 309 U.S. 94 (1940); *Arlington Hotel v. Fant*, 276 U.S. 439 (1929); and *Pacific Coast Dairy v. Department of Agriculture*, 318 U.S. 285 (1943); *Chicago, Rock Island & P. Ry. Co. v. McGlinn*,

114 U.S. 542 (1885). Cases relied on by the Courts below, including *Howard v. Commissioners*, 344 U.S. 624 (1953) and *Kiker v. Philadelphia*, 364 Pa. 624, 31 A.2d 289 (1943) cert. denied 320 U.S. 741, are believed to be distinguishable from the instant cases because the state apparently ceded the areas in question *before* passage of the Buck Act.

The decision of the Court below in the instant case is irreconcilable with its own decision in *Arledge v. Mabry*, 197 P.2d 884 (N.M. 1948), in which the New Mexico Supreme Court held not only that residents of an exclusive jurisdiction area in New Mexico could not vote, but also that votes cast at polling places on the area were invalid, as the place was "not in New Mexico". (The New Mexico Legislature later cured the inequity created by the *Arledge case*, and granted voting rights to residents of federal areas in New Mexico). If these exclusive reservations are "not in New Mexico", what is the basis for the levy of tax on incomes earned in such areas?

The Court below held that the Buck Act was self-executing and was therefore applicable in the instant case in spite of the facts that cession took place *after* the passage of the Buck Act, and that State tax legislation, if any, in effect at the time of cession with respect to non-residents was unconstitutional. The Buck Act should not be construed to confer jurisdiction to tax, but only to consent to such valid taxation as was then in existence. Congress should not be deemed to have given such broad approval or blanket authority to unbridled and continuing state taxation in federal areas without explicit and unambiguous legislative action. Even when Congress has adopted state laws in federal areas, it "has acted as definitely as if it had repeated the words" used by the state, as Mr. Justice Holmes said in dissent in

Knickerbocker Ice Co. v. Stewart, 253 U.S. 148 at 167 (1920). The extent of Congressional authorization to State taxation has been before this Court before in several cases, including *Offutt Housing Co. v. Sarpy*, 351 U.S. 259 (1956), in which the Court stated that Congress, in failing to provide explicit and unambiguous legislative enactment had left specific problems to be resolved by the judiciary. The Court, with difficulty, held that Congress had intended to permit state taxation by the general language used. Congress subsequently changed the law to limit such taxation, Act of 11 August, 1955, § 408, 69 Stat. 653, as amended, 42 U.S.C. § 1594 (note) (1958), and thereafter passed an act providing that if private leasehold interests in federal property is *later* made taxable by State or local governments, the lease *shall* be re-negotiated, 10 U.S.C. § 2667 (c) (1958). The *Offutt* case shows that when Congress fails to act with specificity, the Court can and does "guess" wrongly as to what it meant. Since Congress has used only general language here, it has not spelled out its intent to permit *continuing* state legislation, as it apparently did in Offutt, and has specifically done on occasion, as under the Assimilative Crimes Act, 18 U.S.C. § 13. More specificity should be required before holding that the Buck Act gave unlimited and continuing jurisdiction to enact income tax laws applicable to all employees in federal areas, particularly in view of the fact here that the New Mexico Supreme Court itself has held the state income tax laws unconstitutional in the case of non-residents. As Mr. Justice Douglas, with whom Mr. Justice Black concurred in dissenting in *U.S. v. Sharpnack*, 355 U.S. 286 at 290 and 291 (1958) (the Assimilative Crimes Act case) states:

> "The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is vested . . . It is no answer to say

> that the citizen would have a defense . . . to unconstitutional application of these laws or the procedures under them. He is entitled to the considered judgment of Congress . . ."

It should be noted here that the federal "policy" in favor of State taxation in federal areas, as expressed by the Buck Act, is not as all inclusive as might be thought, and is perhaps discriminatory in effect in that it authorizes State taxes on income, sales and use in federal areas, but not on privately owned personal property, which is still immune, *Humble Pipe Line Co. v. Waggoner*, 376 U.S. 369 (1964); *IBM v. Vaughn*, 98 S.2d 474 (Fla. 1957).

This Court should grant the writ in these cases to decide the Constitutional efficacy of the Buck Act to recede taxing authority to the State of New Mexico over White Sands Missile Range in light of the facts of these cases and the Court's prior decisions. The proper construction of the Buck Act is to hold that it was not intended to authorize continuing or unconstitutional state taxation, and thereby avoid any construction which would render the Buck Act itself unconstitutional.

2. This case also concerns the right of Texas residents to be free from paying the full rate of income tax to the State of New Mexico, from which they have received no benefit or protection. In attacking the jurisdiction of the State to levy such a tax, petitioners believe that important questions of federal constitutional law are presented which have not been, but should be, resolved by this Court. General and basic principles have been announced, but their applicability to the instant case appears to have been overlooked by the Courts below.

> This Court stated in *U.S. v. Bennett*, 232 U.S. 299 (1914):

> " . . . the power to tax was limited by the capacity of the taxing government to afford that *benefit and protection which is the true basis of the right to tax*, and which causes, therefore, taxation, where such capacity to confer benefit and afford protection does not exist, to be a mere arbitrary and unwarranted burden," 232 U.S. 307. (Emphasis added)

The Court has heretofore recognized the distinction between the right of the *federal* government to tax the income of a citizen resident abroad, even if derived from property located at his residence, *Cook v. Tait*, 265 U.S. 47 (1924), and the lack of power of a state to tax those to whom it affords no benefits or protection, *U.S. v. Bennett*, supra. The basis of the distinction is that the protection of the federal government follows the citizen wherever he goes, whereas the benefits of a state government accrue only to persons and property within its jurisdiction. As set forth in various decisions of this Court, jurisdiction to tax, in the case of residents, is said to be founded upon the rights and privileges incident to domicile; that is the *protection* afforded the recipient of income in his person, in his right to receive the income, and in his enjoyment of it when received, and in the case of non-residents, upon *dominion* over either the receiver of the income or the property or activity from which it is derived, and upon the obligation to contribute to the support of a government which renders secure the collection of such income. *Lawrence v. State Tax Comm.*, 286 U.S. 276 (1932); *Shaffer v. Carter*, 252 U.S. 37 (1920); *Travis v. Yale and Towne Mfg. Co.*, 252 U.S. 60 (1920); *James v. Drano Contracting Co.*, 302 U.S. 134 (1937) and others. There are limits, however. "The taxing power of a state is restricted to her confines and may not be exercised in respect of subjects beyond them", *Guaranty Trust Co. v. Vir-*

ginia, 305 U.S. 19, 23 (1938); *Alpha Portland Cement Co. v. Massachusetts,* 268 U.S. 203 (1925)

The Buck Act does not *confer* jurisdiction to tax to the states or create a basis for such where the same did not previously exist. All the Buck Act can be said to have done, at most, was to consent to the exercise of jurisdiction which was already in existence or inoperable solely because of cession of jurisdiction to the United States. The Buck Act does not say the states may now collect income tax from anyone and everyone, regardless of their connection with the State. It merely states individuals are not relieved from such tax liability levied by any State "having *jurisdiction* to levy such a tax." (Emphasis added). It should be noted here that the 1961 New Mexico acts included a provision for the deduction from "base income" of amounts which the State is "prohibited from taxing because of the provisions of the Federal Constitution," (72-15-6B, supra, page 6), but its officials continue to insist upon collection of the full rate from Petitioners in the instant cases.

The most important and basis issues created by the instant cases, in light of the principles previously announced by this Court arise out of the question: What does the White Sands worker who lives in El Paso, Texas, get for his New Mexico tax dollar? If the answer to this question is "nothing", then the tax must be held invalid. Petitioners submit that the record in this case fails to show *any* benefit conferred upon or protection afforded to them by the State of New Mexico. By reason of the fact that White Sands is a federal enclave, the State affords no police protection, security of employment, collection of salary or any other of the rights of citizenship of the State in such area, and although Petitioners pay the same rate of state income

tax as residents, they are deprived of the following benefits conferred upon residents of the State:

A. They cannot vote, *Arledge v. Mabry*, 197 P.2d 884 (1948), which held that even residents of federal areas could not vote. (New Mexico Legislative action has apparently changed this rule as to residents of the federal areas.)

B. They cannot send their children to educational institutions of higher learning in the State for free, or at rates equal to those of residents, N.M.S.A., 77-10-4.

C. They have no right to domiciliary legal action in the courts of New Mexico, including such actions as divorces, *Chaney v. Chaney*, 53 N.M. 66, 201 P.2d (1949) (as to residents of federal areas) but see *Grownover v. Grownover*, 58 N.M. 597, 274 P.2d 127 (1940) (after a legislative change) probate and guardianship proceedings, lunacy proceedings, adoptions, state habeas corpus actions and the like.

D. They cannot acquire hunting and fishing licenses at lower cost, N.M.S.A., 53-3-6.

E. They may not serve on juries.

3. The only possible benefit of which petitioners are aware is one which they are entitled to enjoy under the Constitution, free of any abridgment by the State, and which other non-residents may enjoy without taxation. The privileges and immunities of petitioners, as citizens of Texas under Section 2 of Article IV of the United States Constitution, include the right to "pass through, or reside in any . . State for purposes of trade . . professional pursuits, or otherwise", *U. S. v. Wheeler*, 254 U.S. 281 at 297 (1920), quoting Justice Washington on Circuit duty in *Corfield v. Coryell*, 6 Fed. Cas. 546, 500 (No. 3, 230) (C.C.E.D. Pa., 1823).

Citizens of many states use roads in New Mexico without paying it income tax. This Court has utilized Section 2 of Article IV of the Constitution to invalidate state taxes on several occasions, including *Toomer v. Witsell*, 334 U.S. 385 (1948), and *Ward v. Maryland*, 12 Wall. 418, 424 (1871).

This possible benefit is an access road, consisting of approximately six miles, from the White Sands Missile Range Reservation to the State line of Texas, over which Petitioners travel to and from their work at White Sands out of El Paso, Texas, where they reside. Whether it was built by the federal government or by New Mexico and by which sovereign maintained is not shown by the record. No other possible New Mexico facility is actually involved in their employment or receipt of income at White Sands Missile Range from the State of New Mexico.

4. Even if some minimum benefit is afforded petitioners, they assert that such is insufficient to afford the basis for the State of New Mexico to tax them at the full rate and in the same amount as residents who receive the full benefits of citizenship and domicile in the State of New Mexico. This Court has for many years invalidated state tax legislation against foreign corporations under the Due Process and Commerce Clauses when the tax was found to be in an unreasonable proportion to the amount of business in or benefits received from the states, *Hans Rees & Sons v. North Carolina*, 283 U.S. 123 (1931). As this Court said in *Northwestern States Portland Cement Co. v. Minnesota* and *Williams v. Stockham Valves & Fittings, Inc.* 358 U.S. 450 (1959), this problem has become "tangled underbrush of past cases which have not always been clear . . . consistent or reconcilable." Nevertheless, the Court stated the basic principle to be that net income

of foreign corporations, "may be subjected to state taxation *provided* the levy is *not discriminatory* and is *properly apportioned* to local activities within the taxing state forming sufficient nexus to support the same." (Emphasis added) The issue now in such cases appears to be the *fairness* of the *apportionment* formula adopted by the State as to foreign corporations doing business in the State, *General Motors Corp. v. Washington*, 379 U.S. 436 (1964). Even though these multitude of cases center around state taxation of foreign corporations and the Commerce Clause, the individual should have at least equal if not greater rights to protection from this Court under the Due Process and Equal Protection Clauses of the 14th Amendment and from the Comity Clause in Section 2 of Article IV. The Court on at least one occasion has utilized the Privileges and Immunities Clause of the 14th Amendment to invalidate state taxes discriminatory against non-residents, *Colgate v. Harvey*, 296 U.S. 404 (1935). This case was overruled by *Madden v. Kentucky*, 309 U.S. 83, 93 (1940), but the Court has since used the Clause to invalidate state legislation, *Oyama v. California*, 322 U.S. 633, 640, 645 (1948). The principle of the *Colgate* case should be revived if necessary to invalidate the State law here which abridges the privilege of a citizen of Texas to work in a federal area in New Mexico without paying the latter a tax for which he receives nothing other than what the Constitution guarantees him, and which law abridges the immunity of a citizen of Texas from New Mexico income tax unless he receives something from the state sufficient to afford a reasonable basis of the tax. Certainly, New Mexico does not afford equal protection to Petitioners as it does to those who work or reside in the State outside federal areas. If this Court has come to the aid of non-resident corporations, which

were not even recognized as having the rights of citizens under the 14th Amendment, *Orient Insurance Co. v. Doggs*, 172 U.S. 557 at 561 (1899), the Court should come to the aid of these non-resident individual citizens who are victims of state income tax legislation which is just as arbitrary and unreasonable. Are corporations, which are not even "citizens" to receive better treatment, "better" due process and "more" equal protection than citizens? Even if there is some "nexus" here, which Petitioners refute, the amount of tax is clearly not apportioned to the benefits and protection afforded. Isn't the discrimination just as real and unfair where one pays the same tax and receives nothing as in the case where he pays a higher tax for the same protections? In the latter cases, the Court has acted many times to invalidate "discriminatory" taxation against non-residents, *Travis v. Yale & Towne Mfg. Co.* 252 U.S. 60 (1920); *Ward v. Maryland*, 12 Wall. 418, 424 (1871); *Chalker v. Birmingham & N. Ry. Co.*, 249 U.S. 522 (1919). It is not this Court's problem to determine for New Mexico what would be fair, or to draw an apportionment formula for them. The Court's duty is simply to invalidate what is unfair and disproportionate.

It is conceded that present counsel for Petitioners did not represent them until the New Mexico Supreme Court had decided the instant cases, and that the issues involving the Constitutional authority of New Mexico to tax non-residents by reason of their receiving no benefits or protection from the State, and other issues inherent therein, may not have been stressed below to such extent or in such a manner as to make the State aware of their importance to the case. Present Counsel do not know to what extent such questions were stressed below. In view of such circumstances, Peti-

tioners pray that if the State of New Mexico contends that it was not aware of such issues or that it has not had a sufficient opportunity to present all relevant facts in the courts below, that this Court remand these cases to the courts below in order to give the State an opportunity to present other relevant facts, if any, and to have such courts resolve such issues. Counsel believes that such issues have been raised (See Stipulation Appendix D, 1d); have been presented by the Petitioners' pleading (which assert invalidity of the taxes under Section 1 of the 14th Amendment and Section 2 of Article IV of the United States Constitution), their requested findings of facts and conclusions of law, all of which consistently questioned New Mexico's jurisdiction and authority to tax Petitioners, and by the reliance of Respondents and the Court in its opinion below on such cases as *Kiker v. Philadelphia*, 346 Pa. 624, 31A.2d 289 (1943), cert. denied 320 U.S. 741, in which the Pennsylvania Supreme Court dealt at some length with the benefits available in the federal area from the taxing authority as a justification for taxing employees residing in New Jersey. In any event, if the Respondents dispute their awareness of the presence below of the issues urged herein, Petitioners would ask for a remand to afford development of such additional facts, if any, which would give the courts the opportunity to pass on the issues with all of the relevant facts before them. Petitioners feel such remand would better serve the interests of justice rather than to have the Court deny certiorari in view of the importance of these cases to Petitioners, others employed at White Sands and the State of New Mexico, to all of whom these issues have been a constant source of litigation which is likely to continue until acted upon in a definitive manner by this Court. (Because of the discretionary nature of the

Writ hereby applied for, Petitioners acknowledge the existence of another alternative, which would be to grant the Writ, dispose of and define the basic areas of the law involved, and remand the case for further proceedings, as was done in *Paul v. U.S.*, 371 U.S. 245 (1963), and Petitioners pray that such additional alternative be considered and granted if deemed appropriate by the Court.)

CONCLUSION

WHEREFORE, Petitioners pray that a Writ of Certiorari issue from this Honarble Court to review the judgment of the Supreme Court of New Mexico in Burns v. State, et al. (No.8453) and Hert v. State, et al. (No. 8454). In the alternative, Petitioners pray that this cause be remanded to the courts below if the Respondents dispute their awareness in the Courts below of the issues presented herein. In the event that the petition is granted, Petitioners pray that the judgments of the courts below be vacated if further proceedings are necessary and if not, that they be reversed, and that the courts below be directed to grant the relief prayed for in their petitions and to invalidate the New Mexico Income Tax law as to them.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, JOSEPH A. CALAMIA, Attorney for Petitioners Raymond Burns and James B. Hert, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of ..... 1968, I served true copies of the foregoing Petition for a Writ of Certiorari to the Supreme Court of the State of New Mexico, on the following parties, who are all the parties required to be served, and that they have been served in the following manner as provided by Rule 33, Paragraph 1 and Paragraph 3, Section b:

1. By depositing in a United States Mail Box, a copy of this Petition for a Writ of Certiorari in a properly and duly addressed envelope, Air Mail postage prepaid, to the Honorable Boston E. Witt, Attorney General of the State of New Mexico, State Capitol Building, Santa Fe, New Mexico.

JOSEPH A. CALAMIA